

9-12-2019

Anonymous Response to MTC Prioritized Issues List

Provided below are comments and recommendations for consideration in developing the white paper for the Uniformity Committee.

Issue #1 - Definition of marketplace facilitator/provider

MTC Background Information: State statutory definitions of “marketplace facilitator/provider” fall into two roughly equal categories: the “narrow” definition vs. the “broad” definition. Nineteen States and DC have adopted a narrow definition of marketplace facilitator/provider (AR AZ CO CT DC HI IL MD ME MN NE NM NY OK PA SC SD TX WI WY). Fifteen States have adopted a broad definition of marketplace facilitator/provider (CA IA ID KY MA ND NJ NV OH RI UT VA VT WA WV).

MTC Question: Can more uniformity be achieved in this definition?

Anonymous Response: Yes. The adoption of a uniform and narrow definition by states is necessary. The varied definitions being adopted by states creates confusion among marketplace facilitators/providers, marketplace sellers, and the revenue departments responsible for administering the tax.

The narrow definitions that have been enacted provide the greatest degree of clarity. A narrow definition in no way limits the amount of tax that is collected by a state. The broad definitions that have been enacted are ambiguous and create confusion. Anonymous recommends a definition in line with that developed by the Council on State Taxation “COST”). Anonymous suggests the following narrow definition:

"Marketplace facilitator/provider" means a person who facilitates a retail sale by a marketplace seller by:

- (1) Listing or advertising for sale by the marketplace seller in any forum tangible personal property or services that are subject to tax under this chapter; and
- (2) Collecting payment from the customer and transmitting that payment to the marketplace seller, either directly or indirectly, through agreements or arrangements with third parties, regardless of whether the marketplace facilitator/provider receives compensation or other consideration in exchange for its services.

A marketplace facilitator/provider does not include a person who provides internet advertising services, or product listing, and does not collect payment from the purchaser and transmit payment to the marketplace seller.

Rationale for Narrow Definition: Under the broad definition adopted by some states, a person may fall within the definition of a marketplace facilitator/provider and be required to collect and remit sales/use tax even though the person does not have access to any of the information necessary to fulfill these responsibilities.

As an example, a person who (Part A) simply “owns or operates the infrastructure . . . which brings buyers and sellers together” and who (Part B) also “lists products for sale” or “advertises or promotes” can be drawn in the definition of a marketplace facilitator/provider. As such, it creates the need for a separate clause that explicitly excludes a provider of Internet advertising services.

Merely owning or operating the infrastructure or performing software development related to activities in Part B, and listing/advertising/promoting should not put a person in the position of having to collect and remit sales tax. Frequently, Internet advertising service providers do not process payments or have knowledge of whether a sale of the advertised product or service was even completed. This language is unnecessary and should not be part of the marketplace facilitator/provider definition.

- **Issue #2 – Marketplace Facilitator/Provider as the Retailer**

MTC Background Information: The following states consider the marketplace facilitator/provider to be the seller/retailer/vendor concerning facilitated sales: AR CA CO CT DC HI IL MA ME ND NE NJ NY OH RI SD TX UT VT WA WI WV WY.

MTC Question: Should marketplace facilitator/providers have the same rights as retailers under state law, such as claiming price adjustments, bad debt deductions, vendor compensation (if provided by the state), etc.?

Anonymous Response: Yes, but only as it relates specifically to the sales and use tax law. Specifically, any blanket rights and responsibilities provision should be carefully limited to ensure that other areas of state law (such as products liability, etc.) are not inadvertently impacted. States should thoughtfully consider whether specifically addressing certain rights and responsibilities is needed to alleviate uncertainty for taxpayers, such as adding explicit language/guidance indicating that the marketplace facilitator/provider is able to accept tax exemption certificates in the name of either the marketplace facilitator or the marketplace seller for whom they are facilitating the sale.

- **Issue #3 - Remote seller and marketplace seller vs. marketplace facilitator/provider recordkeeping, audit exposure and liability protection**

MTC Background Information: Enacted marketplace facilitator/provider collection laws generally provide that the marketplace facilitator/provider is the party to be audited, not the marketplace seller, on facilitated sales transactions. However, some of those laws also impose recordkeeping requirements on marketplace sellers for facilitated sales and subject the marketplace seller to audit under certain circumstances (such as when the marketplace facilitator/provider can establish that its failure to collect was due to erroneous information provided by the marketplace seller). Such laws may include liability protection for the marketplace facilitator/provider when the failure to collect is due to incorrect or insufficient

information provided by the marketplace seller, in which case the marketplace seller assumes the liability for failure to collect. Some of those laws only include such liability protection for “incorrect” information provided by the marketplace seller.

MTC Question: Do clearer, simpler standards need to be put in place (such as defining the specific information the marketplace facilitator/provider can rely on for the marketplace seller to provide, and vice versa) in assigning liability for failure to collect between the marketplace facilitator/provider and the marketplace seller and in determining which party is subject to audit under what circumstances?

Anonymous Response (Audit Responsibility): Yes. It is Anonymous’s view that whoever collects and remits the tax should be the primarily responsible for responding to audit inquiries by the taxing jurisdiction. Anonymous supports the following proposed language proposed by RILA as part of the NCSL work group process and COST:

RILA - The [department] shall solely audit the marketplace facilitator for sales made by marketplace sellers but facilitated by the marketplace facilitator, except with respect to transactions that are subject to Section 1.C. The [department] will not audit or otherwise assess tax against marketplace sellers for sales facilitated by a marketplace facilitator except to the extent the marketplace facilitator seeks relief under section (H) or with respect to transactions that are subject to Section 1.C or 1.D. H.

COST - The [department] will only audit and assess marketplace facilitators for transactions where they are required to collect and remit the tax. Except for transactions for which a marketplace facilitator seeks relief under Subsection (C) or (I), a marketplace seller shall not be subject to audit or assessment on marketplace facilitator transactions.

Anonymous Response (Liability Protection): Anonymous agrees with the following language proposed by RILA and COST:

RILA - A marketplace facilitator shall be relieved of liability under this [section] for failure to collect and remit the correct amount of tax to the extent that the error was due to incorrect or insufficient information given to the marketplace facilitator by the marketplace seller, provided that the marketplace facilitator can demonstrate it made a reasonable effort to obtain correct and sufficient information from the marketplace seller. Provided, however, this [subsection] shall not apply if the marketplace facilitator and the marketplace seller are related as defined in [cite code section].

COST - A marketplace facilitator shall be relieved of liability under this [section] for failure to collect and remit sales or use tax on sales facilitated for marketplace sellers, excluding related entities as defined in [cite code section], when the marketplace facilitator demonstrates to the satisfaction of [the department] that the facilitator relied on insufficient or incorrect information from the marketplace seller that was necessary to determine taxability or proper sourcing of a transaction. A marketplace seller is not relieved of liability under this subsection for transactions for which it provides

insufficient or incorrect information provided the marketplace facilitator demonstrates a reasonable attempt to obtain the information from the marketplace seller.

Additionally, Anonymous supports states including liability relief for potentially applicable interest and penalties when a vendor, seller or marketplace facilitator demonstrates that a good-faith effort has been made to implement systems and make process changes in order to comply with the new marketplace facilitator collection, remittance, and reporting responsibilities.

- **Issue #4 - Marketplace seller-marketplace facilitator/provider information requirements**

MTC Question: In situations when the marketplace seller retains responsibility for tax compliance, should the marketplace seller receive adequate information from the marketplace facilitator on marketplace transactions to allow for compliance with other tax laws?

Anonymous Response: A marketplace facilitator/provider should not be *required* to provide any data or information beyond what is required for the facilitator/provider to collect and remit sales and use (or applicable transaction) tax.

MTC Question: Should clear guidelines exist as to the information each party must provide to the other in order for the obligated party to correctly collect and report tax?

Anonymous Response: Yes. Guidelines should be established to enable the party responsible for collection and remittance to fulfill its obligation. The data requirements should be uniform, and the data format should be standardized. The provider of the data should be allowed no less than 15 days.

- **Issue #5 - Collection/Remittance Responsibility Determination**

MTC Background Information: The following states have included provisions in their marketplace facilitator/provider collection statutes permitting the marketplace facilitator/provider and the marketplace seller to negotiate which party has the collection obligation: ME, MN, NV, NJ.

MTC Question: Should the marketplace facilitator/provider and the marketplace seller, under certain circumstances (such as when the marketplace seller has already been collecting the tax, etc.), be able to contractually agree which party has the sales/use tax collection obligation?

Anonymous Response: Yes, the taxing jurisdiction should respect the terms of the agreement between a marketplace facilitator & marketplace seller regarding the fulfillment of their tax collection and remittance responsibilities.

MTC Background Information: The following states allow the head of the state tax agency to waive the marketplace facilitator/provider collection requirement in certain circumstances: MD MA OH TX VA WI.

MTC Question: Should the state tax agency have the authority to waive the marketplace facilitator/provider collection requirement in certain limited circumstances?

Anonymous Response: At the request of the marketplace facilitator/provider, states should have the authority to waive marketplace facilitator/providers collection requirement for a short transitional period in limited circumstances (including if the marketplace seller agrees in writing to assume the collection responsibility during the waiver period). Waiver limitations and requirements should be published by the tax agency and applied in a uniform manner to all marketplaces.

MTC Background Information: States that have enacted marketplace facilitator/provider collection requirements generally apply those to the full extent of their tax bases: retail sales of tangible personal property, taxable services, and taxable digital products. However, some states have limited the marketplace facilitator/provider collection requirements only to retail sales of tangible personal property.

MTC Question: Should marketplace facilitator/provider collection requirements exclude certain services?

Anonymous Response: No, the sales and use tax base of the collection requirement imposed on a marketplace facilitator/provider should mirror that of a retailer/vendor making direct sales.

MTC Background: At least one state (IN) has extended marketplace facilitator/provider collection requirements to include certain other excise taxes (food & beverage taxes, innkeeper taxes).

MTC Question: When the sales transaction involves other applicable taxes, besides sales/use tax, which party (marketplace facilitator/provider or marketplace seller) should be responsible to collect?

Anonymous Response: The marketplace facilitator's collection/remittance responsibilities should only extend to sales and use tax. Other excise taxes should continue to be the responsibility of the marketplace sellers (who are currently collecting and remitting these more complex industry-specific taxes and are better equipped to do so).

- **Issue #7 - Remote Seller sales/use tax economic nexus threshold issues**

MTC Background Information: Most states that have enacted sales/use tax economic nexus provide that if either the sales volume threshold or the transactions volume threshold is exceeded, then nexus exists, and the remote seller is required to register and commence collecting and remitting sales/use tax. The following states do not include a transactions threshold in their sales/use tax economic nexus statutes: SC ND WA CO ID IA NM PA MA OK CA TX AZ. Of those, CA and TX use a \$500,000 threshold. New York has a \$500,000 threshold and 100 transactions threshold. Arizona has a \$200,000 sales volume threshold for remote sellers that decreases by \$50,000 per year until it reaches \$100,000 in 2021, but marketplace facilitators are subject to the \$100,000 sales volume threshold as of 2019. Connecticut uses a \$100,000 sales volume and 200 transactions threshold. By regulation, TN uses a \$500,000 sales volume threshold, and AL and MS use a \$250,000 sales volume threshold.

MTC Question: Should the “transactions” economic nexus threshold be eliminated?

Anonymous Response: Yes, a threshold based solely on sales volume is preferred, such as that enacted in WA State. A single threshold based on sales volume represents better tax policy and is easier to administer.

- **Issue #8 - Certification Requirement**

MTC Background Information: To date, it does not appear that any state has adopted such certification requirements for marketplace facilitators. States that are members of the Streamlined Sales and Use Tax Agreement (SSUTA) have adopted certification requirements for certified service providers. However, a marketplace facilitator would not need to go through that certification process unless it wanted to become a certified service provider under the SSUTA.

MTC Question: Should the marketplace facilitator/provider be required to provide a certification or report to the marketplace seller?

Anonymous Response: No, this is unnecessary and unduly burdensome to the marketplace facilitator/provider. If the marketplace facilitator/provider is collecting and remitting tax and generally assuming responsibility for the liability, it should not need to certify or report tax or sales related information to the marketplace seller above and beyond what the parties agree to by contract.

MTC Question: How does the marketplace seller know if the marketplace facilitator/provider has collected?

Anonymous Response: As long as the marketplace facilitator notifies the marketplace seller in the agreement between the two parties that the facilitator will collect and remit the sales

tax on the marketplace seller's sales, there should be no additional requirement for the facilitator to provide a separate document or written notification to the seller. Electronic notice (such as an email or direct message on the marketplace facilitator/provider's website/platform) would also be an option to notify the marketplace seller that tax is being collected in a less formalistic/burdensome manner.

OTHER ISSUES OF INTEREST TO MICROSOFT

1. Class Action & Qui Tam Protection

MTC Background Information & Questions: Many marketplace facilitator/provider collection statutes include for marketplace facilitator/providers protection against class action lawsuits for overcollection of tax. Should this protection be extended to marketplace sellers, or sellers in general? Also, should protection against *qui tam* lawsuits be included (if the state otherwise permits *qui tam* lawsuits)?

Anonymous Response: Legislation requiring marketplace facilitators to register, collect, and remit sales/use tax on facilitated sales should include provisions protecting the marketplace facilitator from the risk of class action and *qui tam* lawsuits. Anonymous agrees with the proposed language below developed by COST.

COST - Notwithstanding any other limitations, no claim for making a class action or *qui tam* or false claims action may be brought against a marketplace facilitator or marketplace seller in any court of this state on behalf of customers, the state, or any other party arising from or in any way related to an overpayment or underpayment of sales or use tax collected on sales upon which a marketplace facilitator was required to collect and remit the tax, regardless of whether that claim is characterized as a tax refund claim. Nothing in this subsection affects a customer's right to seek a refund as provided under section [cite code section] or the right of the [department] to conduct an audit.

2. Retroactivity

MTC Question: Should marketplace facilitator/provider collection laws include a provision prohibiting retroactive enforcement?

Anonymous Response: Yes, the laws should be clear that no obligation to collect the sales and use tax required by the marketplace facilitator/provider law will be applied retroactively.

3. Tax Returns/Tax Reporting

Anonymous Comment: Marketplace facilitators should have the ability to report the third-party sales (on behalf of marketplace sellers) and related tax on the same tax return as the marketplace facilitator's direct sales. Failing to permit such "combined" reporting of direct and third-party sales by a marketplace facilitator will result in a significant administrative burden to marketplace

facilitators that have historically collected and remitted sales tax on behalf of third-party sellers that sell through their platforms and disrupt current tax collection and remittance practices of these taxpayers.